

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
Rules and Regulations Implementing	)	CG Docket No. 02-278
the Telephone Consumer Protection of	)	
1991	)	

**Comments of Private Citizen, Inc.**

Established in May of 1988, Private Citizen, Inc. (Private Citizen) is a for-profit pro-privacy consumer organization dedicated to limiting the privacy abusive practices of the direct marketing industry, with a concentration in the area of residential (out-bound) telephone solicitation. As president and founder of Private Citizen, I have consistently tracked the industry's growth and impact on the privacy rights of individuals. At present, Private Citizen has over 5,000 members, consisting of both businesses and residents, who have asked our assistance in limiting the number of 'junk' telenuisance-marketing calls to their telephone lines.

Private Citizen members define 'telemarketing' calls to include calls made by an entity, which are intended to result in sales, survey information, charitable contributions and/or political support; whether live, prerecorded or via fax. Private Citizen notifies more than 1,500 such entities, that our members are unwilling to freely receive such calls, regardless of any prior business relationship or putative permission granted by the called party, prior to that calling entity's receipt of the Private Citizen do-not-call Directory.

Concerning the subject rulemaking, Private Citizen, Inc. joined with the Electronic Privacy Information Center, and others, in presenting comments, dated December 9, 2002, to the Federal Communications Commission. Private Citizen, Inc. now offers the following comments independently, as additions to and/or amplifications of the above mentioned December 9<sup>th</sup> comments.

**A Statement of Philosophy -**

Private Citizen's view of telephone solicitations, particularly those to residents, does not include a consideration of a caller's Constitutional right of free speech. Rather, we are concerned with the right of residents to enjoy their fundamental human right to be left alone at home; free of those we seek to avoid. Certainly, if that right does not exist in our homes, it will not exist for anyone in America while they remain on the green side of the sod.

Somehow, our judicial/legislative/regulative bodies seem consumed with defining which objectionable solicitation calls, may or may not be initiated to the residence of an unwilling recipient, based on the intended content of that speech. This ignores the well-established premise that a home is tantamount to a castle, into which not even 'the king may enter'.

United States courts have granted a higher level of Constitutional protection to non-commercial speech, than commercial speech. By applying this standard to residential solicitation calls (sales/survey/charity/political) the resident is deprived of the right to be left alone at home, free of any solicitation calls. While a speaker may have a virtually unlimited number of venues to present his constitutionally protected speech; the resident has but one locale to enjoy the fundamental right to be left alone.

The ringing summons of our telephone at home is as much a component of the caller's speech as the old town crier's ringing of his bell while shouting 'Hear ye'. Today's technology enables the equivalent of that town crier and his bell to enter the sanctuary of our homes, forcing us to respond to his ringing summons. Perhaps one telemarketer, named Direct Marketer of the Year<sup>1</sup>, described it best when he said,

"[We are] conditioned to sit up and listen when the phone rings in our home. How natural is it for us to turn the TV down, or even to move into another room to give the caller our undivided attention. And when the caller is a telemarketer, the result is a concentrated commercial message to which we have no other choice but to respond."

This circumstance would not be tolerated by our forefathers, and should not be allowed today, regardless of the content of the speech (commercial or otherwise) which would follow. This is not a matter of another's right of free speech in a public forum. This is a matter of the human right of sanctuary at home. It seems reasonable that an unknown entity's right to summon us from our private activity at home (regardless of the intended content of that speech) is inferior to the privacy rights of the resident.<sup>2</sup>

**The FCC should take steps to effectively protect our right to be left alone; free of telephone solicitations we seek to avoid -**

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<sup>1</sup> Dante Cirilli, Vice President - Grolier Telemarketing, "Dialing for Dollars" The Washington Monthly, December 1986. In its October 1999 issue, Target Marketing magazine named Mr. Cirilli "Direct Marketer of the Year."

<sup>2</sup> Frisby et al. V. Schultz et al. No. 87-168 487 U.S. 474 (1988)

"One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, cf. *Erznoznik v. City of Jacksonville*, supra, at 210-211; *Cohen v. California*, 403 U.S. 15, 21 -22 (1971), the home is different. "That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere." *Rowan v. Post Office Dept.*, 397 U.S. 728, 738 (1970). Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability [487 U.S. 474, 485] to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom. See, e. g., *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 -749 (1978) (offensive radio broadcasts); id., at 759-760 (Powell, J., concurring in part and concurring in judgment) (same); *Rowan*, supra (offensive mailings); *Kovacs v. Cooper*, 336 U.S. 77, 86 - 87 (1949) (sound trucks)."

"This principle is reflected even in prior decisions in which we have invalidated complete bans on expressive activity, including bans operating in residential areas. See, e. g., *Schneider v. State*, 308 U.S. 147, 162 -163 (1939) (hand-billing); *Martin v. Struthers*, 319 U.S. 141 (1943) (door-to-door solicitation). In all such cases, we have been careful to acknowledge that unwilling listeners may be protected when within their own homes. In *Schneider*, for example, in striking down a complete ban on handbilling, we spoke of a right to distribute literature only "to one willing to receive it." Similarly, when we invalidated a ban on door-to-door solicitation in *Martin*, we did so on the basis that the "home owner could protect himself from such intrusion by an appropriate sign 'that he is unwilling to be disturbed.'" *Kovacs*, 336 U.S., at 86. We have "never intimated that the visitor could insert a foot in the door and insist on a hearing." *Ibid*. There simply is no right to force speech into the home of an unwilling listener."

As illuminated below, most solicitation calls serve more to disturb than benefit the called resident. As professionals, the telemarketing industry is empirically aware of this circumstance. In a society that values the accepted convention of not unreasonably disturbing others at home, it is absurd that the telephone solicitation industry has been allowed to make a profession of it.

#### **A national opt-in list is preferred -**

Private Citizen asks the FCC to request additional regulatory powers from Congress that will enable residents to 'opt-in' to any or all variations of solicitation calls, whether intended for the purpose of sales, survey, fundraising or political support.

- Sales calls - For all practical purposes, this is a universally reviled type solicitation call. Surveys too numerous to mention here, and contrary to the direct marketing industry's protestations, have shown this to be the case. Today, aside from 'standard' live sales solicitations calls, there are now various guises being used by telephone marketers in hopes of sidestepping the Telephone Consumer Protection Act, including:
  - a) Caller ID advertisements - On March 10, 2002, my residential phone rang one time and stopped. The resulting display on my Caller ID was "FREE MONEY 1-214-615-3414". Calling that number back resulted in a recorded solicitation by Matthew Lesko, pitching his 'government grant' book, which was also heavily advertised on television at that time. In July 2002, 5 million phone lines suffered outages in Osaka, Japan as a result of the mass broadcasting of similar Caller ID advertisements.<sup>3</sup>
  - b) Repeated calls that show only a toll-free number on Caller ID - Again, these calls consist of a single ring. But in this situation, Caller ID displays only a toll free number falsely posing as the originating number. When such numbers are called back, the typical result is a recorded message consisting of, "You have reached customer service. We will call you back". Thus, the toll free number holder will be able to improperly claim that the resident that called the number thereby established a 'business relationship' with the holder/telemarketer. In turn, the firm that placed the call will proceed to telemarket the resident with auto-dialed prerecorded solicitations based on that putative business relationship.
  - c) Prerecorded 'notifications' - These calls commonly claim the called party was selected to receive a 'free' vacation, participate in a business opportunity or the like. The callback number is one that results in a solicitation to attend a sales presentation.
  - d) Prerecorded faux non-profit calls - Here, a firm calls (ostensibly) on behalf of a non-profit organization, intending to sell a service such as debt consolidation. Although the call is soliciting a commercial transaction, the caller's tenuous affiliation with a non-profit is used to mask its violation of the TCPA.
  - e) Prerecorded calls promoting for-profit broadcast programming. - As recently as this month, the Discovery Channel was using this method in promoting its segment on the German battleship 'The Bismarck'.
- Survey (tele-marketing-research) calls - A survey firm once called this writer seeking to interview residents who commuted to work by train. During a subsequent chat with an executive of that firm, he stated that, on average, surveyors would call and talk to 130 residents in order to find one that commuted by train. When asked why the survey is not

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<sup>3</sup> Caller-ID Campaign Jams Phone Lines in Osaka, DM News, July 30, 2002

conducted on the train station or on commuter train itself, his response was "That would be too expensive". Evidently, when telemarketers balance the cost to a resident's privacy against their expenses, privacy does not have sufficient weight.

Some surveys require the input of individuals within a specific psycho-demographic segment. For example, these may be residents who purchased a major appliance within the past 3 years and have at least one child in college. Such surveys commonly require that 50 to 100 residents be called to their phone before one is found to fall into that segment. And of those, 33% to 38% refuse to be interviewed. In comparison to the present high refusal rate, it was in the area of 5% or less in the 1970s, when the telemarketing industry was beginning to grow to what it is today<sup>4</sup>. Evidently, residents now consider any unsolicited call to be 'another junk call'. As a result, the cost of consumer research is increasing, and the telemarketing-research industry must call more numbers to gain the sample required by a given study. Here we have a circular corollary to the law of diminishing returns; the law of increasing telemarketing-research solicitations. The FCC should give the people an opportunity to avoid these aimless intrusions.

- Fundraising calls - Calls by for-profit telemarketing firms on behalf of charities have become synonymous with actual (if not legally defined) fraud. A report issued by the New York attorney general's office concerning such fundraising campaigns found that of the \$188 million raised in the state for charities by telemarketers in 2000, \$129 million, or 68.5 percent, went to the for-profit telemarketing firms.<sup>5</sup> Illinois Attorney General Ryan will be arguing a case before the United States Supreme Court concerning an Illinois for-profit telemarketing firm that solicited on behalf of a Viet Nam charity. In that situation, only 15% of the funds collected went to the charity, 85% went to the telemarketing firm.

Commonly, for-profit telemarketers soliciting on behalf of police/sheriff/firefighter charities will target the elderly knowing that they will more likely 'donate' in light of their perceived possible imminent need for emergency services from such municipal entities. In the end, the money that does reach the 'charity' winds up in the hands of the municipal worker's union. And there, the executive staff of that union will likely retain a substantial portion for their own use.

- Political calls - During the last election cycle our political candidates participated in the wholesale violation of the TCPA. Indeed, even president George W. Bush took it upon himself to join in on the illegal trampling of our privacy when his recorded voice was used to promote Republican candidates.<sup>6</sup> The recording did not include identification requirements mandated by 47 C.F.R §64.1200 (d)(2). Private Citizen has received reports from across the nation about state and local candidates who violated the same aspect of the TCPA. Indeed, many of those candidates were running for their state's office of Attorney General - the only state entity which can enforce that aspect of the TCPA. The irony of our state law enforcement officer's illegal invasion of our privacy is not lost on the average citizen, as our state Attorney's General barge into our homes with a machine in order to violate the law they seek to convince us that they will uphold.

Residents have come to define any solicitation call, regardless of its purpose, as a telemarketing call. People do not study the machinations of the telenuisance industry's latest

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<sup>4</sup> Telephone conversation with Mr. Larry Mock - Executive Director: Council for Marketing and Opinion Research, Inc., May, 2002

<sup>5</sup> <http://www.oag.state.ny.us/charities/pennies01/penintro.html>

<sup>6</sup> <http://privatecitizen.com/news/bush-adad.html>

buzzword to describe itself. Regardless of the appellation it uses; teleservice call, survey call, courtesy call, fundraising call, care call, political call, appreciation call, or a green leafy vegetable call, it is a telemarketing call in the eye of the called resident.

At the turn of the millenium, in an informal survey conducted by Time Magazine, on-line visitors to time.com were asked to rank the 100 worst ideas of the 20<sup>th</sup> century. With 232,919 responses, telemarketing came in as the fourth worst idea of the century, the worst being Prohibition. For some perspective, the Treaty of Versailles, Spray-on Hair and the Edsel were well behind.<sup>7</sup> Though not a 'scientific' survey, the number of respondents, and telemarketing's ranking as the 4 worst 20<sup>th</sup> Century idea, gives additional weight to telephone solicitation as a reviled marketing practice.

A national opt-in list is the only effective way to balance the privacy rights of residents against the enterprise of the out-bound telephone solicitation industry. An industry which insists on touting its benefit to residents, while it seems not recognize the extent of its drumbeat of unwelcome intrusions that it inflicts on us. Therefore, based on the industry's own public relations stance, I see no logical reason for direct marketers to object to a national opt-in list.

The anthem of the industry is, "We don't want to call those who do not want to be called". Considering the level of distaste that residents hold for solicitation calls, an opt-in list would (if you will) serve them right.

#### **A national do-not-call list -**

An alternative to a truly effective opt-in list would be a less effective (but hopefully meaningful) national opt-out list. Again, such a list should enable residents to opt-out of any or all categories of solicitation calls (sales/survey/charity/political).

#### **State law preemption -**

As voters have elected such strong conservative proponents of states' rights to Congress in the most recent election, such a national opt-out list should not preempt state do-not-call lists when such lists offer a higher level of privacy protection.

#### **Cost of registering on a national list to avoid junk calls -**

Privacy is considered a right in the United States of America, not a privilege. Therefore, since privileges must be earned or paid for in order to acquire them, and rights are free, there should be no fee collateral to registering on a list created to avoid telemarketing calls.

#### **Recording of telephone solicitation calls by the called party -**

In prosecuting a lawsuit against a violating telemarketer, it is necessary to present evidence in court concerning the subject call. Since telemarketers commonly conclude their business by phone, and always use our personal property (telephone) in their enterprise it is appropriate to allow called parties to make an audio recording of the conversation without the consent of the calling party. Should the FCC create such implied consent (on the part of the telephone solicitor) via FCC regulation, the solicitor will know that, by making the call, it may be recorded by the called party. This will assist litigants and will reduce the false statements

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<sup>7</sup> <http://www.time.com/time/time100/worstideas.html>

made by telephone solicitors during their pitch, knowing that the statements may be memorialized in audio format.

**Attorney's fees in a TCPA cause of action -**

As the FCC is likely aware, pro se TCPA plaintiffs may find themselves confronted with a skilled attorney representing the telephone solicitor in court. In the past, these defendant attorneys have swamped plaintiffs with paperwork and complex legal argument.

The FCC should enable prevailing plaintiffs to collect attorney's fees, as well as all court costs, when a lawyer represents a TCPA defendant.

**The FCC should remove the 'one free' live call violation per year from the TCPA -**

I believe that the TCPA allowed live solicitors to violate the law one time within a 12-month period, in an effort to save them from court action due to an 'innocent' violation. The TCPA has now been in force for more than a decade. Telemarketers are (or should be) now fully aware of the TCPA. It is time to lift this 'pass'. As it stands now, residents have likened it to allowing a driver to speed in a school zone once per year without concern.

**Placement on the do-not-call list and implementation of the do-not-call request -**

I commonly hear from residents who tell me that a telemarketing firm will advise a resident that it may take up to 8-weeks to stop calling that resident, subsequent to that resident's do-not-call request made pursuant to the TCPA. If the FCC elects to forego a national list and instead maintain its regulations concerning company-specific do-not-call lists, I trust the FCC will strongly clarify that the words of its regulation mean simply what they say. A do-not-call request shall be entered on the do-not-call list at the time the request is made, and that calling a residence on the do-not-call list is a violation of the TCPA.

We live in a time of virtually instant communications. There is absolutely no legitimate excuse to continue to call a do-not-call listee, when, if instead the called party had 'taken the credit card or phone service' the calls would have immediately ceased. Over the past 10 years, I have spoken with a number of individuals who have taken the product or service offered by a telephone-soliciting firm, in order to stop the calls. This was the case even though a prior do-not-call request was presented, repeatedly for up to four months earlier.

**Predictive Dialer abandonment rates -**

First, I address the telephone solicitation industry's claim that an abandonment rate of 0% is not feasible for technical or financial reasons. State and federal law-regulation commonly imposes restrictions and/or requirements on enterprises that deal with the public. One such requirement is handicapped access at restaurants. Regardless of the cost to the proprietor, a restaurant must be 'handicapped-friendly' or it is out of business.

If a telephone solicitation organization cannot abide by a simple restriction, preventing them from hanging up on live answered calls or 'short-ringing' residential numbers (launching a call and terminating the connection before a person answers [within 4 rings]) that organization should not be allowed to call any residences. This is not rocket science and residents are not at home to be shorn of their privacy. If a 10-year-old is not allowed to call

telephones with the intent of hanging up on a specified number of them once answered, what compelling and meaningful legal, moral or financial argument can a telephone solicitor make in doing the very same thing. California will be implementing a 1% abandonment rate soon. I trust the FCC will absolutely prohibit predictive dialer abandonment as a measure of respect for the residents and families of the nation.

#### **PREDICTIVE DIALING: A TECHNOLOGY THAT COMMONLY RESULTS IN PREDATORY DIALING**

##### **Calculating a National Rate of Telemarketing to Residents -**

Calculations below are based on 1991 findings of Public Law 102-243 (S. 1462) and current technology. The 1991 Congressional Findings concerned the regulation of sales calls to homes. Congress found that **18,000,000** calls were made every day and **\$435 billion** in sales was attributable to calls to both businesses and residents.

##### **- The daily number of telemarketing calls made to residents -**

The 18 million daily calls to be regulated by Congress in 1991 were sales calls made to both homes and businesses.<sup>8</sup> All estimates here are conservative and noted. Predictive dialers (PDs) were not generally used in 1991. Now, PDs make most calls, which increase a firm's 'productivity' (call rate / talk-time) eight-fold.<sup>9</sup> Coincidentally, the \$435 billion figure was the same as that of a 1985 prediction of telemarketing sales in 1990.<sup>10</sup>

**18,000,000 x 5<sup>11</sup>** (increase due to today's ubiquity and technology of PD's) = **90,000,000** calls per day

Note: The 1991 Congressional Report cites \$435 billion in telemarketing sales. Today, the Direct Marketing Association (DMA) claims annual sales of \$668.8 billion, an increase of **54%**.

**90,000,000 x 54% growth = 1,386,000,000** calls per day

Note: The \$668.8 billion in sales is comprised of \$276.6 billion in consumer sales and \$392.2 in business sales: a ratio of **41%** to 59% respectively. Using that ratio alone, to calculate calls to residents, we have:

**1,386,000,000 x .41** (residential only) = **568,260,000** calls to residences today relative to 1991 figures

Note: As residents receive more 'junk' calls, they are less likely to buy as a result of any such calls. Thus, this is one reason the number of residential calls has increased in relation to sales. To accommodate this higher 'refusal' rate we will estimate an increased call-to-sales ratio of **15%** over that of 1991.

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<sup>8</sup> Public Law 102-243 (S. 1462), Section 2, Findings: "The Congress finds that: (2) "Over 30,000 businesses actively telemarket goods and services to businesses and residential customers." (3) More than 300,00 solicitors call more than 18,000,000 Americans every day."

<sup>9</sup> Affidavit of Randy Hicks: Director of Automation and Network Operations in the Operations group of WorldCom. In Support of the Opening Comments of [MCI] Worldcom, Inc. on Draft Decision of [California P.U.C.] Commissioner Brown - Rulemaking No. R.02-02-020

<sup>10</sup> Two of the four organizations involved in that 1985 prediction were Telemarketing Magazine and the Direct Marketing Association

<sup>11</sup> Eight-fold increase reduced to five-fold in order to assure conservative outcome

568,260,000 x 15% increased 'refusal' rate = 650,449,000 calls per day

**650 MILLION daily telemarketing calls to residences,  
intending to make a commercial pitch  
(regardless of whether a pitch was made)**

Note: At first glance, this may seem an overestimate. It is not, in that it attempts to take into account 'hang up' calls made by telemarketing predictive dialers, wherein:

1. a telemarketer is unavailable after the call answered. (abandoned call hang up)
2. a telemarketer is determined to be unavailable, before a call is answered. (short ring hang up)
3. the predictive dialer's 'answering machine detection algorithm' correctly determines that the call was to an answering machine. (answering machine detection hang up)
4. the predictive dialer's 'answering machine detection algorithm' mistakenly determines that a live answered call was an answering machine due to a longer-than-standard 'hello' greeting (Hello, this is the Bush residence) or residential background noise, such as a television. (answering machine detection error hang up)

This calculation does not take into account the fact that the average sale to a business is inherently greater than that of a residential sale. For example, a telemarketing call from a vendor representative to a retail or manufacturing headquarters commonly results in a sale of \$10,000 to \$100,000 or more, and is typically between firms that have an ongoing and current business relationship. Furthermore, such calls are commonly expected, welcomed and handled by a firm's purchasing department. Also, telemarketing calls to businesses cannot fully take advantage of predictive dialer technology commonly employed in residential calls. Factoring these actualities into the above calculation would likely reveal a telemarketing call rate to residences twice that estimated above.

**In conclusion -**

I trust the FCC will amend the TCPA in such a fashion so as to protect the privacy of the nation's families at home, and thank the Commission for its time in considering these comments.

Sincerely,

Robert Bulmash - President  
Private citizen, Inc.